

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of North Point Marina LLC)	
(Alibi Dock Marina) for a Permit to Expand)	Case No. 3-LMD-95-257
Docking Facilities on the Bed of Green Bay,)	
Town of Gibraltar, Door County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

North Point Marina LLC has applied to the Department of Natural Resources for a permit to expand the existing Alibi Dock Marina in Fish Creek, Wisconsin. The Department of Natural Resources issued a notice which stated that unless written objection was made within thirty days of publication of the notice, the Department might issue a decision on the permit without a hearing. The Department received several timely objections to the permit application.

Pursuant to due notice, a hearing was conducted in Sturgeon Bay, Wisconsin on November 30, 1995, January 4 and February 1, 1996, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The Gibraltar Preservation Commission filed its closing argument on February 14, 1996 and an "addendum" to its closing argument on February 20, 1996; the Department of Natural Resources filed its closing argument on February 15, 1996; and the applicant filed its closing argument on February 19, 1996; Attorney Brett Eric Reetz filed closing argument on February 21, 1996.

Along with its closing argument, the applicant filed a motion to reconsider an evidentiary ruling. Additionally, on February 28, 1996 the applicant filed a motion to strike the closing argument and addendum to closing argument filed by the Gibraltar Preservation Commission. On March 4, 1996, the Gibraltar Preservation Commission filed a response to the applicant's motion.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

North Point Marina LLC, applicant, by

Waltraud A. Arts, Attorney
P. O. Box 2113
Madison, Wisconsin 53701-2113

and

James R. Smith, Attorney
454 Kentucky Street
Sturgeon Bay, Wisconsin 54235

Wisconsin Department of Natural Resources, by

Charles R. Hammer, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Attorney Brett Reetz, Objector
4158 Main Street
Fish Creek, Wisconsin 54212

Gibraltar Preservation Commission, Inc., by

Robert Merline, Chairperson
3588 Peninsula Players Road
Fish Creek, Wisconsin 54212

Dane County Environmental Council, by

Jerome Viste
1916 Viste Road
Sturgeon Bay, Wisconsin 54235

PRELIMINARY MATTERS

The applicant filed a motion to strike the closing argument and addendum to closing argument filed by the Gibraltar Preservation Commission. Both written arguments were timely filed with the Division of Hearings and Appeals. However, the addendum to closing argument is a response to the Department's closing argument. The schedule in this matter allowed for the filing of simultaneous closing arguments only. No provision for responsive argument was made. For this reason the addendum to closing argument will not be considered. The applicant's motion to strike the addendum to closing argument of the Gibraltar Preservation Commission is granted. The motion to strike its initial closing argument is denied.

With respect to the applicant's motion to reconsider the evidentiary ruling to not admit exhibits 52, 53 and 54, this motion is denied and these exhibits will not be admitted to

the record. The rule for admissibility of evidence for administrative hearings is found at sec. 227.45(1), Stats. Section 227.45(1), Stats, provides in relevant part:

. . . an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. . . . Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact.

The exhibits offered are unduly repetitious of the testimony of the applicant's witnesses, primarily David Wentland. The exhibits are not admissible pursuant to § 227.45(1), Stats. The exhibits also constitute hearsay and as such have limited probative value. Because of the limited probative value they are also inadmissible to the record of this matter.

In its motion, the applicant argues that the exhibits are admissible under sec. 907.03, Stats. Section 907.03, Stats., provides:

Bases of opinion testimony by experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Section 907.03, Stats., provides that an expert may testify regarding an opinion based upon facts or data which are not admissible. It does not provide that the facts or data should be admitted. Additionally, sec. 907.03, Stats., refers to facts or data, exhibits 52, 53 and 54 are the resume of Dr. Kwang K. Lee and two letters from Dr. Lee to David Wentland. The letters contain Dr. Lee's opinions. None of these exhibits contain facts or data upon which Mr. Wentland based his opinions, rather they contain Dr. Lee's credentials and his opinion which is supportive of Mr. Wentland's opinion.

Applicable Law

Section 30.12(2), Stats., provides in relevant part:

The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest.

FINDINGS OF FACT

1. North Point Marina LLC (North Point or applicant) owns property along the shore of Green Bay at Fish Creek, Wisconsin. The legal description of the property is all of Lots 1 and 2 and part of Lot 3, Block 20 in Asa Thorp's Plat, and part of Government Lot 5, Section 29, Township 31 North, Range 27 East, Town of Gibraltar, Door County, Wisconsin. The property has 650 feet of frontage along Green Bay.

2. North Point acquired the above described property from the Sturgeon Bay Yacht Club in March, 1995. The property is currently the site of the Alibi Dock Marina. North Point is a part of the James Company, a real estate development company. The James Company also owns and manages Hidden Harbor Condominiums and Harbor Guest House Resort, two other waterfront properties in Fish Creek. The Harbor Guest House Marina is located immediately west of the Alibi Dock Marina.

3. North Point, by Ed James, president, 1535 Lake Cook Road, Northbrook, Illinois, has applied to the Department of Natural Resources (Department) for a permit pursuant to sec. 30.12(2), Stats., to expand the existing Alibi Dock Marina. North Point is financially capable of constructing, maintaining, and monitoring the proposed structures. The Department and North Point have complied with all procedural requirements of sec. 30.02, Stats.

4. The proposal consists of extending an existing bulkhead (pier one) approximately 275 feet in an easterly direction, extending the Harbor Guest House Marina dock 156 feet, and removing an existing pier and replacing it with a new structure (pier four). The project also includes the installation of two floating piers within the marina (piers two and three). The number of existing boat mooring slips is 53. This proposal will increase the permanent boat mooring slips to 91.

The pier one extension and the Harbor Guest House Marina dock extension will be fixed structures with culverts allowing water circulation within the proposed marina. Pier four will be a suspended structure on steel cells. Both the pier one extension and the Harbor Guest House Marina dock extension will have armor stone riprap on the outboard surface of the structures. A diagram of the proposed expansion is attached to this order as Attachment A.

The new marina will have a total of 39 finger piers. Thirty of the piers will be 36 feet long, six will be fifty feet long and three will be thirty feet long. The finger piers will be three feet wide. (Exhibit 42 of the hearing record shows the placement of the finger piers.)

5. The general purpose of this project is to repair the deteriorated condition of the current Alibi Dock Marina pier structures and to provide additional recreational slips for boats using the waters of Green Bay. The project will also provide sanitary pump out facilities for boats using the marina and the waters of Green Bay.

6. The current Alibi Marina is flanked on the west by the Harbor Guest House Marina and on the east by the Retreat Dock and Town Dock. The area of the harbor north and east of the Town Dock is a designated mooring area. The proposed expansion of the Alibi Marina will not extend further into the harbor than the Town Dock. This area of the harbor is not generally available for navigating and; therefore the proposed expansion of the Alibi Marina will not constitute a material obstruction to navigation.

7. Objectors to the project expressed concerned that the construction of the pier one extension will funnel boaters using the marina to a single opening between the east end of the pier one extension and the Retreat Dock and Town Dock. The width of the opening to the proposed marina and the size of the channel between the end of pier one and the Town Dock are ample to permit the safe navigation of boats. Although all boaters using the proposed North Point Marina will be funnelled through a single opening, based on the size and number of boats projected to be entering or exiting the marina at the same time this funnelling will not constitute a material obstruction to navigation.

8. The proposed project will not have a detrimental impact on the public interest in natural scenic beauty. The basis for this finding is set forth in the Discussion section below.

9. The proposed structures uses a substantial amount of the public lakebed of Green Bay for a private purpose. However, as discussed above this area is not generally available to the public for boating and other incidents of navigation. The proposed project will contribute to filling a need for additional mooring slips in Green Bay and increase public access to Green Bay. The size of the proposed project and the number of boat slips proposed is a reasonable use of the applicant's riparian zone.

10. The proposed project will not have a detrimental effect on water quality. The basis of this finding is set forth in the Discussion Section below.

11. The objectors expressed concern that construction of the proposed project will result in wave reflection that could damage other portions of the shoreline in the harbor. Of particular concern was shoreline in Peninsula State Park, located across the harbor northeast of the project site. The existing Alibi Marina pier structures are constructed using steel sheeting. The proposed structures will use armor stone riprap. Construction of the proposed structure should reduce the amount of wave reflection in the harbor. The proposed project will not result in any detriment to the public interest caused by wave reflection.

12. The objectors expressed concern that construction of the proposed project will result in increased sedimentation in the harbor. An intended consequence of construction of the pier one extension is calmer water within the marina. Calmer water potentially could result in increased sedimentation in the marina area. Regular dredging is an indication of a sedimentation problem. The record contains no evidence that dredging has been required on a regular basis in the harbor in the past. Although construction of the proposed project may result in some increase in sedimentation, the record contains no evidence that this increase will be significant or detrimental to the public interest.

13. The applicant's consultant predicted that construction of the proposed project will result in increased growth of aquatic plants within the marina. With proper management the "weed" growth can be controlled and will not be detrimental to the public interest.

14. The proposed structures will not reduce the effective flood flow capacity of Green Bay.

15. The Department has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact. This project is a Type III project under NR 150, Wis. Adm. Code, and an appropriate public notification of the project was given.

DISCUSSION

The objections to the proposed project were primarily limited to two aspects of the public interest. These aspects are a concern that the proposed project will have an adverse impact on the public interest in the natural scenic beauty of the site and adversely affect water quality in the harbor.

The public interest in natural scenic beauty is normally considered the view of the shoreline from the water. In the instant case, the shoreline in the vicinity of the proposed project is already developed. The proposed project will not adversely affect the natural scenic beauty of the shoreline of the harbor when viewed from the water. The use of armor stone riprap on the breakwater will actually give the project a more natural appearance than the steel sheeting used for the current piers of the Alibi Marina.

The testimony at the hearing in this matter focused not on the natural scenic beauty of the shoreline but rather the view of open water from Clark Park. The view of open water from Clark Park is already severely restricted by the Town Dock on the east side of the park, the Retreat Dock on the west side of the park and ships moored in the designated mooring area. It is understandable that town residents are objecting to further obstructing the little view of open water left from Clark Park; however, overall the effect on this view by

the proposed project is not significant. On balance, those persons who wish to view open water will be better served by being able to walk out onto the extension of pier one, than they currently are from any part of Clark Park.

The other public interest concern was the affect of the proposed project on water quality in the harbor. The concerns about water quality are twofold. The first concern is the effect that providing permanent mooring space for 38 additional boats will have on water quality. Although no specific numbers were provided, it is clear that the harbor at Fish Creek currently has a great deal of boat traffic, especially on summer weekends. Based on the amount of boat traffic already present in the harbor, it is impossible to say based on the evidence in the record that 38 additional mooring spaces will have any measurable impact.

Any effect of 38 additional mooring spaces is speculation. One cannot determine what impact the proposal will have until it is known what types of boats will use those mooring spaces and how frequently those boats will be used. It is possible that 38 additional mooring spaces will actually result in less boat traffic in the harbor because some boaters wishing to visit Fish Creek will now be able to moor their boats in a slip rather than boating into and out of Fish Creek Harbor for their visit.

The other concern about water quality relates to the potential for increased stagnation of the water in the area of the proposed project. If water cannot circulate through the harbor, the water quality will be degraded. The witnesses for the objectors did not disagree with the conclusions of the applicant's consultants; however, they were of the opinion that not enough investigation and data collection was done to determine whether the proposed project would adversely affect water quality. The objector's experts recommended the applicants be required to perform some type of modeling prior to the issuance of a permit for the proposed project.

Modeling has only been required for marina projects in rare circumstances. The Department determined that it was not necessary for this project and despite the limitations of the investigation done by the applicant's consultants, it does not appear to be justified in this case. Although the applicant's consultants had limited data, they used conservative numbers for their calculations. It is highly unlikely that the amount of time it will take to flush the harbor will be any longer than the time calculated by the consultants and almost surely will be less time.

Additionally, the openings in the proposed project will be much greater in size and number than those on the current Harbor Guest House Marina dock and Alibi Marina piers. This should improve circulation compared to what currently exists. There was no testimony that the current water quality of Fish Creek Harbor is detrimental to the public interest. If anything, the water quality should improve slightly after the completion of the proposed project.

The applicant has the burden to prove the proposed project will not be detrimental to the public interest. This does not mean the applicant is required to present evidence rebutting every potential impact suggested by the objectors. Ultimately, each of the experts testifying on behalf of the objectors stated he did not disagree with the conclusions reached by the applicant's consultants, but rather that insufficient data was collected to support the conclusions. Despite the limitations raised by the objectors, the evidence presented by the applicant showing the proposed project will not be detrimental to the public interest is adequate. The standard of proof in this matter is facts must be proven to a reasonable certainty, by the greater weight of the credible evidence. The applicant has satisfied this burden.

Finally, it should also be noted that the permit granted is not irrevocable. If the Department determines at any time that the project has become detrimental to the public interest, the permit can be modified or revoked. It is not appropriate to deny the application for the permit solely on speculation; however, if the possibilities suggested by the objectors do occur, necessary and appropriate modifications to the permit may be made.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed structures described in the findings of fact constitute structures within the meaning of sec. 30.12, Stats.
3. The project if constructed as proposed and subject to the conditions specified in the permit will not materially obstruct navigation or reduce the effective flood flow capacity of Green Bay and is not detrimental to the public interest in navigable waters.
4. The proposed project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.
5. The Division of Hearings and Appeals has authority pursuant to secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue the following permit for the construction and maintenance of the structures as requested by the applicant.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction and maintenance of structures as described in the foregoing Findings of Fact and shown on Attachment A, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structures.
4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then. Pursuant to sec. 30.07(1)(b), Stats., for good cause, the Department may extend the time limit for the permit for no longer than two years if the grantee requests an extension prior to expiration of the initial time limit.
5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittee shall notify the area Water Management Specialist, not less than five working days before starting construction and again not more than five days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.
8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water management Specialist, at least five working days in advance.

9. The total number of boats permanently moored in the marina shall not exceed 91. The applicant shall not allow more than one boat to occupy any slip other than on a temporary basis.

10. Slips shall be rented or leased for a term not to exceed five years per rental or lease period. At the expiration of the five year lease or rental period, the rental agreement or lease may be renewed.

11. Availability of slips will be advertised in the local newspaper of greatest general circulation at least twice each spring.

12. A waiting list of persons interested in renting or leasing a slip shall be maintained by the applicant with the waiting list kept current and updated at least once every two years.

13. The waiting list shall be made available to the Department upon reasonable request during normal business hours and at the normal office location.

14. Fees for slip rental or lease shall be reasonable. "Reasonable fees" means fees which are consistent with fees charged at similar facilities in the area which are available to the general public.

15. Prior to the commencement of construction of the proposed project, the permittee shall submit for Department approval a plan for monitoring water quality in the area of the marina. The plan shall include baseline measurements establishing the quality of the water in the area prior to the commencement of construction of the project.

16. Prior to the completion of construction of the proposed project, the permittee shall submit for Department approval a plan for weed management within the marina.

17. The general public shall have access to the structure during daylight hours for the purposes of fishing and sightseeing with the exception of the finger piers extending perpendicular from the main piers.

18. The pier shall not have any electrical service facilities below the flood protection elevation.

19. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on April 2, 1996.

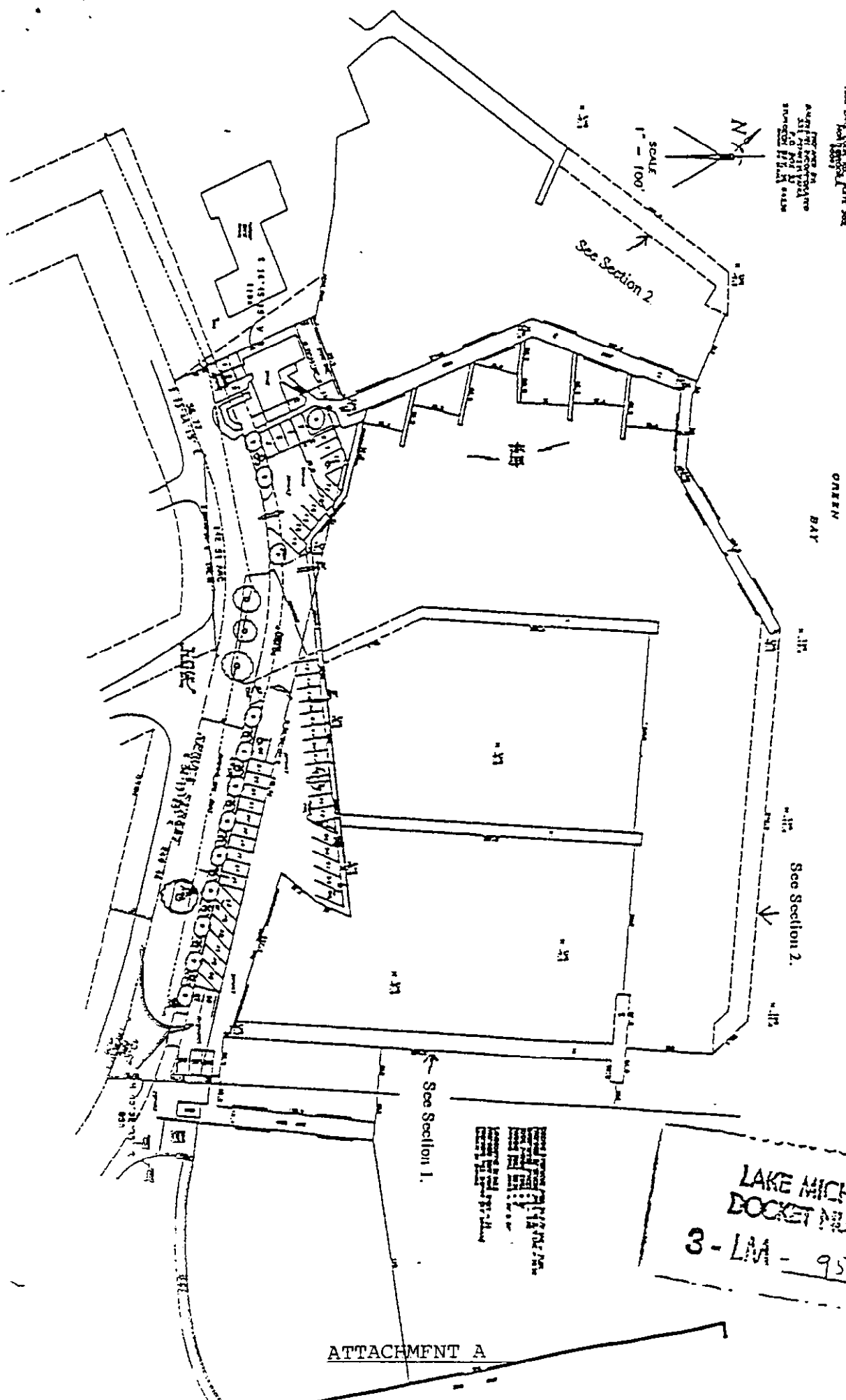
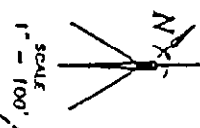
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

PROPOSED MARINA & PROPOSED PARKING LAYOUT

ASX HIRSH'S PLAT, SECTION 19, T. 31 N., R. 27 E.,
10MI. OF CRAWFORD, DEER COUNTY,
MISSOURI

PROPOSED MARINA LAYOUT
1. 100' x 100' x 100' x 100'
2. 100' x 100' x 100' x 100'
3. 100' x 100' x 100' x 100'
4. 100' x 100' x 100' x 100'



LAKE MICHIGAN
DOCKET NUMBER
3-LM-95-257,258

ATTACHMENT A

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.